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IN THE

Supreme Court of the United States

OCTOBER TERM 1955.

PATRICIA THURNAU, as Administratrix of the Estate of PHILIP GEORGE THURNAU, Deceased,

Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment for defendant entered at the close of plaintiff's case after the granting of a motion by the defendant for a directed verdict and to dismiss the complaint, and affirmed by the Court of Appeals.

Opinion Below.

The opinion of the United States Court of Appeals, printed in Appendix B hereto, is reported at 229 F. 2d 73.

Jurisdiction.

The decision of the Court of Appeals sought to be reviewed was rendered January 16th, 1956.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. A. 1254 (1).

Constitutional Provision and Statutes Involved.

The constitutional provision applicable to the instant matter is Article 3, Sec. 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . ."

The statutes involved are the Jones Act (46 U. S. C. A.) 688 *et seq.*) and the Federal Employers Liability Act (45 U. S. C. A. 51 *et seq.*).

Questions Presented.

Does the administratrix widow have a cause of action for wrongful death when the plaintiff's decedent is killed while acting in the course of employment within the meaning of the Jones Act by a fellow servant's negligence several miles from where the ship is docked where both seamen are under articles on shore leave, and plaintiff's decedent was being taken back to the ship, and the accident occurs on the road back to the ship because of haste in returning.

This question includes the following subsidiary questions which flow from the *per curiam* opinion of the Court of Appeals (Appendix B).

(a) Although the Court of Appeals Second Circuit had decided in the earlier case of *Kyriakos* v. *Goulandris*, 1945,

151 F. 2d 132, that the shipowner is liable for indemnity as well as for maintenance and cure where the injury occurs miles from the ship, and the Court of Appeals for the Third Circuit reached the same conclusion as applied to the reasoning of *all* cases of fellow servant negligence in *Nowery* v. *Smith*, 69 F. Supp. 755, aff'd 3 Cir., 1947, 161 F. 2d 732, are these cases to be construed as "assault cases, which appear to be *sui generis*," as the Court now holds and therefore entitled to extend jurisdiction comprising many more miles than ordinary cases of fellow servant negligence under the Jones Act.

(b) And if assault cases are to be construed so that they are to have many more miles of jurisdiction on land although the action is based on fellow servant negligence under the Jones Act upon what basis should other acts of fellow servant negligence like the almost unquestioned negligence in the case at bar be limited to jurisdiction embracing the area of the ship or, at most, adjacent to the ship?

(c) Would not assault cases then enjoy preferred and more advantageous treatment over other acts of fellow servant negligence? Was it not the intent of Congress and the Courts to treat assault cases from the point of jurisdiction, and otherwise like other acts of fellow servant negligence?

(d) Is the Court of Appeals of the Sixth Circuit in error in *McDonough* v. *Buckeye SS. Co.* (*supra*), when the law is stated to be that the shipowner is liable for fellow servant negligence during shore leave in an area removed from the ship, when it resulted from the act of taking a shipmate back to the ship.

(e) Is the Court of Appeals of the Ninth Circuit in error where it answers the crucial point of in the course

of employment in a compensation case reasoning so nearly analagous to seamen that the decision is reported in American Maritime Cases, when it upholds the findings of the Deputy Commissioner that when the employee is on the road back to his employment but miles from his place of work, and he is injured in a car accident by a fellow employee, the injury is compensable.

(f) If the negligence and injury occur "in the course of employment" by a fellow servant, does not the case fall within the Jones Act even though miles from the ship, and even though the case is not based on assault?

Statement.

There had been a bus strike by the Mobile City Line employees from June 15, 1950 through August 22, 1950. There was no service during this period. The service had consisted of operating approximately 117 buses which were withdrawn during the strike.

In May of 1950, 62,000 revenue passengers, 9,000 transfer passengers for a total of 71,000, were carried daily, over 13 different routes throughout the city. One of these routes served the area of the Aluminum Ore Company and was known as Route No. 9.

Far from various means of transportation being "readily available," as the Court of Appeals wrote in its opinion, the unimpeached testimony of Mr. Douville, the Vice President of the local U-Drive-It on the effect of the bus strike, was as follows; and deserves appropriate attention since the case was dismissed at the close of the plaintiff's case.

> "Q. You saw public appeals in the city press for people acting as citizens to pick up others, to transport them to work and back. Is that right? A. Yes.

> Q. And you saw public appeals that neighbors join with one another in forming car pools, to take people to work and return. Is that right? A. Yes, sir."

A number of the members of the crew came from Mobile. This is also the major port in the itinerary, since passengers were discharged at this port, old articles were terminated and new articles signed.

The defendant conducts extensive business operations insofar as shipping is concerned. It leases the Aluminum Ore Company docks in Mobile, where its vessels dock. The bauxite which it carries along with passengers is unloaded at Mobile to be processed.

With the state of transportation as severely curtailed as outlined above, and with no contradiction, if contradiction to stark figures and bare facts stated by Mr. Douville there could be, plans were made on the ship by First Assistant Engineer Kossman and Jr. Third Assistant Engineer Wold on how they would get transportation for shore leave.

Reese, an ordinary seaman, testified that "it is the usual practice the usual procedure is if I have a car or any member of the crew has a car, if anybody's ready to go to town at that particular time, we all just pile in and go to town. In other words, it's just working together" (R. 95). He further testified, as to the practise with reference to cars and returning crewmen:

> "Q. As a usual practice, does that always follow, when men meet in town, and one has the car, they all come on back to the ship? A. Yes, sir. That is, if they're going back at the same time, and the driver is ready to go."

Giving the plaintiff the most favorable light in view of the dismissal at the close of her case, it must be assumed

that Kossman, the First Assistant Engineer, and the third ranking officer of a valuable ship transporting valuable cargo, must have taken the practise of the crew with reference to cars into account. As a transportation man, he could not be deaf, dumb, and blind to conditions of local transportation which were so well publicized by the press and radio in Mobile, where defendant shipowner conducted its most important discharging operations of passengers and cargo.

Since the bus strike had been on without any let up since June 15th, 1950, and this was now July 20th, and the ship made only short runs from Mobile to the Carribean Sea, *at least a jury could say that Kossman, who had hired a U-Drive-It only once before, made his decision to hire the U-Drive-It on the ship as an officer of the defendant fully cognizant of conditions, shore leave, and the practise of the crew to be transported in this vehicle if made available.* Despite the ramifications which would ensue, he could have decided as such officer that shore leave would entail difficulties in getting back to the ship and missing of the ship by crew members, with attendant delays, and if not delays, difficulties in sailing short handed.

Regardless of the reason, the fact remains that on July 20th, 1950, the day of arrival of the SS. *Pegasus,* and at about 3 o'clock, **on the ship the decision was made by Kossman the first assistant engineer and Wold the third assistant to hire the U-Drive-It.**

Kossman, after being cleared by the U-Drive-It people, hired the car in his name.

After going to town in the U-Drive-It, Kossman and Wold went to the "Blue Cove" according to Wold's uncontradicted testimony "to have some drinks, and Kossman wanted to go to the dog races, and was trying to talk me into going with him. While we were having our drinks

Mr. Schultz, the third engineer, joined us. Kossman finally decided to go to the dog races, and I didn't want to go with him, and I refused to go with him, and stayed with Mr. Schultz to have a few more drinks."

Thus, there can be little doubt that Kossman, having participated only the day before the accident in drinking with Wold, a man of 21, knew that he drank. Kossman could also have inquired from Schultz, also an officer of defendant as to whether Wold had continued drinking.

According to the uncontradicted testimony, Wold visited several other drinking establishments, the day before the fatal accident.

All this is important for Kossman, as First Assistant Engineer, after the decision reached aboard ship, had loaned the car to Wold which resulted in the death of Thurnau, a fellow servant of both Wold and Kossman. In view of the fact that according to Corporal Phillips of the Alabama State Patrol that Wold was drunk at the time of the accident, and the horrible nature of the accident as shown by the photographs, and the injuries suffered by plaintiff's decedent, surely some explanation was forthcoming from Kossman, the First Assistant Engineer, a high ranking officer, entrusted with the lives of fellow seamen, as to why he loaned this car to Wold, a man of 21, known by Kossman to be a drinker.

That Kossman knew that members of the crew were being transported in the car is best shown on July 21st, *the day of the fatal accident. With Wold as the driver and Kossman in the car, some of the crew were picked up and brought to town* (Record 47; Court of Appeals Brief, p. 4).

The major point is repeated that the testimony shows that **only members of the crew were transported in this car for the two days embracing the time before the accident and including the time of the accident.**

Although the usual rule is for seamen to get their board and meals aboard ship and do their drinking ashore, Wold testified that he and Kossman went to the Joe Jefferson House to get something to eat. They left the ship at 5:30, it was 6:30 when they were eating and Wold said as early as 7:30 P. M. Wold drove Kossman back to the ship, because he was tired (S. M. 21).

Kossman, a seaman in port, a man in his thirties, apparently got sleepy at a rather early hour, and in a very short time, too, after having had something to eat at the Joe Jefferson House (S. M. 21). [Later Wold swore that he was not sure of the time and it could have been 9 o'clock (S. M. 29).] The difference in time would leave the observation on sleep and tiredness about the same.

[As has been noted, Wold testified to rather profuse drinking at several bars with Kossman and Schultz, both officers, only the day before. And it is noted that he personally knew the roadhouses just outside of town.]

[At the ship, Kossman asked Wold if he wanted the use of the car, which Wold accepted.]

It need hardly be written that not all juries would have relied on Wold's version of pure eating. In fact, a jury could have found that Kossman had one too many about an hour ago, was sleepy and wanted to go to bed, and was plain careless in entrusting the car to a 21 year old in the light of what happened later. If Wold had been drinking, with Kossman, at the same rate as the day before, Kossman did not act like a reasonably prudent mature man in turning the high powered "hot rod" over to Wold.

Since Wold was the survivor, we have only his version. Wold testified that he then took the car and visited friends. At midnight, he stated that when he went to return the U-Drive-It, he found it closed, and decided to keep it. Again and again he said that he did not notice the buses off the street, and when he went to the house of friends in

Mobile, nobody even mentioned the bus strike; and even though he subsequently resided in Mobile, he never heard of the strike; and although several fellow seamen like Reese came from Mobile, which was shown to be *the port of discharge for passengers* even those who boarded at New Orleans or Mobile, and even though Alcoa offices and piers were located in Mobile, and he had worked for almost 3 years on ships like the *Alcoa Patriot, which went but once farther north than Mobile, he knew nothing of the bus strike.* For three years after the accident and up until his testimony was taken at Mobile on September 23, 1953, he was kept so close to Mobile on defendant's ships that he did not even get a chance to visit the widow in New York for except for one trip the ships never got any further north than Mobile. On the one trip he had no chance since he only had one day in and around New York.

Yet despite all this activity centered in and about Mobile, he was curiously oblivious of any bus strike. **We wonder if Wold did not understand that the bus strike was the Achilles heel in the defense?**

How remarkable was this testimony obviously aimed at keeping even the mention of the bus strike out of Wold's testimony can be seen from the testimony of Mr. Douville, vice president of Mobile U-Drive-It (S. M. 118):

> "Q. You saw public appeals in the city press for people acting as citizens to pick up others, to transport them to work and back. Is that right? A. Yes.
>
> Q. And you saw public appeals that neighbors join with one another in forming car pools, to take people to work and return. Is that right? A. Yes sir."

Wold and Kossman were officers earning a livelihood in the transportation business. Could they have possibly been ignorant of a bus strike?

And the wonder of Wold's ignorance of the bus strike is not lessened by examining the testimony of another leading Mobile citizen, Mr. Don Killam, the manager of the Mobile City Lines, who was responsible for the figures on transportation cited above (S. M. 74-79).

On the other hand if young Wold was as blind as his testimony reveals, surely Kossman was negligent in giving the car to Wold knowing that he might pick up fellow seamen and transport them back to the ship. Could just plain eating at the Joe Jefferson House have wrought this as it brought about the tiredness in Kossman who had to go back to the ship at either 7:30 or 9 o'clock? **IF IT WAS DRINK, SURELY THURNAU IS NOT RESPONSIBLE FOR WOLD'S CONDITION HAVING FIRST MET WOLD AFTER MIDNIGHT.**

At any rate, after midnight Wold went to the Tapson House and was having a drink when he met Thurnau. They decided to go to the **Vogue** where it will be remembered Wold was no stranger, having been there the night before, only this time Wold had the car, while the night before Kossman had taken the car to the dog races at Pensacola.

They had only one drink at the **Vogue.** "Since the **Vogue** was even deader than the Tapson House" they decided to go to a **Crystal Springs** which they could not find. So they then decided to go to the **Temple Gardens,** which is on Highway 90. The account of the accident follows (S. M. 23):

"I did not know how to cut across from where we were at to Highway 90. I did know how to come back into town and **go out Highway 90, which I did do.** We went to the Temple Gardens, which seemed to me to be quite a rough place. We were standing at the bar having a drink when I noticed there was a dice game going in the back room, so we went in to watch the game. As the dice were passed

around, they were handed to me, so I took my turn rolling them. When I lost the dice, I passed them to Mr. Thurnau, and asked him if he wanted to try it, which he did. We shot dice as they came around to us until someone mentioned it was almost 5 o'clock, which Thurnau and I realized was getting late for us, as we were supposed to be back to the ship by six. So we left as fast as possible, got in the car and I took the wrong direction. **As the Temple Gardens is on the main highway, and me not being familiar with Mobile, both directions looked the same to me. After I had gone a few miles, I did realize that I was headed in the wrong direction as there was no houses. I turned the car around and started back toward Mobile. I hit a curve and the rear of the car skidded. I tried to bring it back, when it skidded in the opposite direction, and there I must have hit a bump and got knocked out."**

Corporal Phillips of the Alabama State Patrol testified that about 5:20 A. M., he received a call on an automobile wreck 2 miles west of Theodore. The party who placed the call had come upon the scene of the accident, gone to Theodore two miles away and made the call. Theodore is just on the outskirts of Mobile. The time of the accident was probably about 5 A. M. and there is no question that had not the mishap occurred, there would have been ample time to return to the ship which left at 6 A. M.

WOLD TOLD CORPORAL PHILLIPS THAT HE HAD THE CAR WIDE OPEN

Photographs taken at the scene by Corporal Phillips' partner within 25 or 30 minutes of the accident shows that radiator emblem was imbedded in a telephone pole **on the left side of the road** about 10 feet in the air, and that ***at the same height it had skimmed the bark from a tree neighboring the telephone pole.***

Wold himself testified that he was going over 70 miles per hour, without specifying how much above. The photographs did not require Wold to specify the speed, for it is safe to deduce that this almost new Ford being run with the throttle wide open was at a speed conservatively estimated as most dangerous. For a car to fly some 10 feet in the air as the pictures demonstrate, and with the throttle wide open on this car as Wold testified, one can easily deduce that the speed was hardly what a prudent man would use to operate such a vehicle.

Corporal Phillips also testified that from Wold's actions, speech, he was drunk.

Wold merely suffered a broken ankle which hospitalized him for a few days and kept him out of work about 3 months.

An ambulance took them to the Marine Hospital, where Thurnau died shortly after arrival. An autopsy was made by Dr. Wirt. *There is nothing in his report to show any drinking by Thurnau.*

The autopsy report on Thurnau showed:

1. Laceration of liver and spleen, severe, due to trauma with hemorrhage into peritoneal cavity, severe.

2. Hemothorax, right, severe due to trauma.

3. Laceration of diaphragm, right, liver, severe, due to trauma.

4. Comminuted fractures of ribs, multiple due to trauma.

5. Dislocation of femur at hip, left due to trauma.

Post mortem studies revealed comminuted fractures of the 7th, 8th, and ninth ribs on the left right hemothorax, traumatic hernia of the right dome of the diaphragm, multiple laceration of the right dome of the liver, multiple

lacerations of the spleen, and massive hemorrhage in the abdominal cavity.

By stipulation Kossman was the only live witness to have been called by the defendant. Defendant was only to have in addition a short deposition of a crew member and the deposition of Dr. Grubbs, a coroner.

By stipulation, Thurnau's wage record with Alcoa shows the following earning record: 1945, $3,037.80; 1946, $3,307.65; 1947, $6,549.55; 1948, $1,792.23; 1949, $5,328.67; 1950, $3,641.58. He left him surviving a widow, age 36 and a daughter, age 11. Thurnau was 39 years old at the time of his accident, which was the competent producing cause of death.

Reasons for Allowance of Writ of Certiorari.

A.

The determination of the Court below is in conflict with decisions of other Courts of Appeals on a federal question of importance. Two opinions almost on all fours by Two Courts of Appeals are not even cited much less distinguished in the decision sought to be reviewed although strongly relied upon in petitioner's brief.

1. The decision sought to be reviewed is contrary to the law recently set forth by the Court of Appeals of the Sixth Circuit in *McDonough* v. *Buckeye SS. Co.*, 103 F. Supp. 473, aff'd. 200 F. 2d 558, certiorari denied 345 U. S. 502. This decision was not even cited by the Court in the decision sought to be reviewed. A reading of petitioner's main brief of 28 pages and his reply brief of 11 pages will show very strong reliance upon this case. Petitioner repeatedly called the Court's attention to the fact that the Sixth Circuit had passed upon the question of law applicable to the case at bar.

The Court of Appeals of the Sixth Circuit held that under the Jones Act the shipowner is liable for the fellow servant negligence of a seaman taking a shipmate back to the ship. Bringing a fellow seaman back to their ship is:

> "... an act of a servant which is in furtherance of the master's interest, is an act in the course of and within the scope of his employment."

In the decision sought to be reviewed, Wold was taking Thurnau back to the ship under whose articles they were, and the accident arose out of haste in so doing, while they were on the direct road back to the ship. It is respectfully submitted that it was an act of a servant which was in furtherance of the master's interest, and is an act in the course of and within the scope of his employment falling squarely within the reasoning of the *McDonough* case.

2. The decision sought to be reviewed is contrary to the law recently set forth by the Court of Appeals of the Ninth Circuit in *Hostolf-Nettles, Inc.* and *United Pacific Ins. Co.* v. *Pillsbury,* 203 F. 2d 641 (1953); A. M. C. 746. Nor was this decision cited in the decision sought to be reviewed although petitioner called the Court's attention to the fact that on the facts and reasoning, the Ninth Circuit had passed upon the question of law applicable to the case at bar.

On pages 22 and 23, petitioner devoted all of his "Point V" to the case in the Ninth Circuit. An analysis of the facts in that case with the facts in the case at bar will show striking closeness of the facts and reasoning of the Ninth Circuit decision with the case sought to be reviewed.

It may be added that although this was a non-maritime case, it was reported in American Maritime Cases, a set which is devoted almost exclusively to maritime matters.

However, the reasoning was so nearly applicable to seamen, that the editors thought it proper to include the case, within the volumes so extensively used by maritime lawyers.

3. The decision sought to be reviewed is contrary to the law as written in the Third Circuit on fellow servant negligence ashore during shore leave in *Nowery* v. *Smith*, 69 F. Supp. 755, aff'd. 161 F. 2d 732.

The flat unequivocal language of *Nowery* v. *Smith* with reasoning based upon Supreme Court decisions is on "all fours" and should fully cover the proposition of law in the case sought to be reviewed.

The opinion is well considered and logically points out that the shipowner is liable for fellow servant negligence on shore leave since shore leave has been found to be ship's business. The reasoning makes no narrow distinction as to the case arising from an assault. It applies to all fellow servant negligence ashore.

Because of the importance of the language and reasoning, petitioner quotes the language from *Nowery* v. *Smith* which also appears on page 13 under Point II of his brief in the decision sought to be reviewed.

> "I recognize that in the *Aguilar* case, and the companion case, Waterman SS. Co. *vs.* Jones, the Supreme Court expressly limited its decision to the facts before it. However, in both cases, it seems to me that it was the occasion for the seaman's absence from the vessel—shore leave which determined that he was "on the shipowner's business" while he was on premises which had to be traversed in going from or returning to the vessel. That being so I think that logic compels the conclusion that the seaman should also be considered on the shipowner's business while he is actually enjoying shore leave. **And if for the purpose of determining the shipowner's liability for**

> maintenance and cure, the seaman is said to be on the shipowner's business while on shore leave I can see no valid reason why for the purpose of determining the Shipowner's liability under the Jones Act, the seaman should not be said to be 'in the course of his employment' at the same time. It is simply a question of defining the seaman's status; and I think that the concepts 'on the shipowner's business' and 'in the course of employment as they are applied to the seafaring trade, comprehend identical factual situations'."

There is nothing in the reasoning which suggests that the case is *sui generis* because it is an assault case. Much less does it intimate that an assault case should give greater rights and encompass a wider area of jurisdiction from the ship than Wold's fellow servant negligence inflicted on Thurnau.

Even the decision sought to be reviewed held:

> "There was sufficient evidence from which a jury could find that Thurnau's death was caused by the negligence of Wold in the operation of the car."

Since the decision also is based on the assumption that "Thurnau was acting 'in the course of employment' within the meaning of the Jones Act while returning to his ship from shore leave—", how then in view of the startling negligence of Wold as fully demonstrated by the photograph admitted in evidence and appended to this petition, can it be logically held that Thurnau's widow and child could recover if Wold had fatally assaulted Thurnau, but not if Wold had negligently caused Thurnau's death.

Examining the earlier cases in the Supreme Court on assaults, it will be found that the basis of recovery was *negligence*. Fellow servant negligence was held to be fellow servant negligence whether it was an assault or any other

type of negligence. The Supreme Court never intimated that an assault case was *sui generis*, and therefore the injured party in the average case of negligence was entitled to less than the victim of an assault inflicted by a fellow servant.

Alpha S.S. Corp. v. *Cain*, 281 U. S. 642;
Jamison v. *Encarnacion*, 281 U. S. 635.

The decision in the case sought to be reviewed places a narrow and rigid construction on the Jones Act which is contrary to the liberality with which the Supreme Court has held that the Act is to be construed, and finds no basis in the opinions of this Court.

Cortes v. *Baltimore Insular Line*, 287 U. S. 367.

B.

The Supreme Court is being petitioned to review a decision involving an important federal question of substance which has not yet been determined by this Court.

1. The question is novel with respect to indemnity, for fellow servant negligence committed ashore during shore leave. For maintenance and cure this Court decided *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724 and *Warren* v. *U. S.*, 340 U. S. 523. Neither case involved fellow servant negligence under the Jones Act.

O'Donnell v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 63, determined that negligence ashore is within the purview of the Jones Act. Chief Justice Stone wrote:

> "The right of recovery under the Jones Act is given to the seaman as such, and, *as in the case of maintenance and cure*, the admiralty jurisdiction over the suit depends *not on the place where the*

injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

It would therefore seem from the rule set forth, that the area of jurisdiction is not confined to the area adjacent to the ship, as the decision holds in the case sought to be reviewed. Since this Court in maintenance and cure cases gives a much wider radius, and Chief Justice Stone compares the same radius for indemnity as for maintenance and cure, it would appear that *fellow servant negligence* would be bounded by the same limits, as the Third Circuit so well reasoned in *Nowery* v. *Smith.*

There is nothing in the language of O'Donnell, which would warrant the opinion in the decision sought to be reviewed, that for Jones Act negligence the limit is the area adjacent to the ship. There is nothing in the language of Aguilar, or Warren, which would limit the reasoning only to maintenance and cure just because fellow servant negligence was not involved in the case.

In any event, with the diverse opinions expressed by several Courts of Appeals as to the interpretation of cases decided by this Court a writ of certiorari should be granted on this important federal question not only for the sake of uniformity as we have urged under I, but also to clarify the cases of this Court with respect to jurisdiction on land under the Jones Act where indemnity is sought for fellow servant negligence.

C.

The Supreme Court is being petitioned to review a decision where the Court of Appeals decided questions of fact in affirming a judgment dismissing the complaint at the close of plaintiff's case, in a jury trial. This was a denial

of due process of law and contrary to the Constitution of the United States.

Since the case was dismissed at the close of plaintiff's case in this death action, it can be seen from the plaintiff's testimony that there was no basis whatever for the Court of Appeals to find that other means of transportation were "readily available".

The unimpeached testimony of Mr. Douville, the Vice President of the U-Drive-It Company, engaged in the business of transportation, in the City of Mobile, furnished absolutely no basis for the Court of Appeals to decide what only a jury could determine as a fact.

Supporting the testimony of Mr. Douville, were the records of the Mobile City Line, referred to in the Statement showing that the strike lasted from June 15, 1950 through August 22, 1950, that there was no service during this period, and that their entire 117 buses were withdrawn during the strike.

This testimony was of great importance since Kossman, the First Assistant Engineer, a high ranking officer of this inanimate corporate defendant, planned the hiring of the car on the ship, and did transport members of the crew on the day of the accident in accordance with Reese's testimony that it was common practice, and did turn the car over to Wold, at the dock by the ship, shortly before the accident. Only members of the crew had been transported in this car to and from the ship.

To say that Kossman, the third officer in command of the ship and crew was not acting for the benefit of the shipowner, justifying a dismissal of the complaint at the close of plaintiff's case, in view of the testimony of Douville, Reese, and the Mobile City Line, violates plaintiff's constitutional right of trial by jury.

The decision completely ignores common experience which teaches us that under the conditions described by

Douville, **transportation to and from the ship was far from being "readily available"**, for why would there be public appeals "that neighbors join with one another, in forming car pools, to take people to work and return".

To further show how unavailable even the U-Drive-It actually was, the undisputed fact was that only Kossman had been cleared by the U-Drive-It people. Kossman had to be cleared by the U-Drive-It people before even he could get this means of transportation, and that this clearing came only from a process of checking on the applicant's background, all of which would naturally take time. Therefore, it is easy to see that even rented cars were not "readily available", and certainly the rented car used in the fatal accident was anything but "readily available."

It was available only because Kossman, a high ranking officer of the defendant, made it available for transporting members of the crew, *for there was no testimony that anybody but crew members were transported in the vehicle.*

Further, it is respectfully submitted that when Kossman, First Assistant Engineer, of the inanimate corporate defendant, knew that Wold, Jr., Third Assistant Engineer, was a drinking man at 21, since Kossman himself had been drinking with him, it was solely a question of fact to be submitted to a jury, as to whether defendant was liable for Kossman's turning the car over to Wold at the dock, and going to bed, knowing there was a bus strike and it was common practice on ship to take members of the crew to and from the ship. Especially since the Alabama State Patrol found that Wold was drunk at the time of the accident, an explanation from Kossman, to satisfy a jury was forthcoming.

Although the decision is correct that a shipowner is under no obligation to furnish transportation, the law is well settled that liability can follow for negligence where the

employer does in fact furnish transportation. The fact that originally he was under no obligation so to do, does not relieve the employer for the ensuing negligence after he does do what he was originally not called upon to perform.

Spencer Kellogg & Sons v. *Hicks*, 285 U. S. 110;
Heaney v. *Carlin Construction Co.; Matter of*, 269 N. Y. 93;
Westcott v. *U. S. Fidelity & Guaranty Co.*, 156 F. 2d 20 (4th Cir., 1946).

How then can a Court of Appeals decide that Kossman, did not act for the benefit of the ship in transporting crew members during this strike **when it is undisputed from the record that only crew members were transported in this vehicle both prior to the accident and at the very time of the accident.**

To support the decision sought to be reviewed the Court cited *Paul* v. *United States*, 3 Cir., 1953, 205 F. 2d; *Lemon* v. *United States*, D. C. Md., 1946 Md., 1946, 68 F. Supp. 793. Neither of these clearly distinguishable cases has the slightest application to the novel principle of fellow servant negligence ashore during shore leave. **Both of these cases decide that a shipowner is not responsible for the negligence of a third party, independent contractor, who is not a member of the crew.**

Even the Court of Appeals of the same circuit (with three different members of the bench) has very recently shown the law to be that the shipowner is not liable for the transportation of members of the crew to and from the ship by a third party, who is not a member of the crew (*McCall* vs. *Overseas Tankship*, 222 F. 2d 441.)

Judge Learned Hand, in a concurring opinion, in the *McCall* case significantly rested his decision on the fact

that the party furnishing the transportation was a third party. On the question of "in the course of employment", which is the crucial question in the case sought to be reviewed, he preferred to leave that open even though the accident and negligence occurred many miles from the ship.

The following are necessary conclusions:

(1) In view of the unquestioned fellow servant negligence of Wold, if the accident occurred in the course of employment as McDonough (*supra*) in the Sixth Circuit, Hostolf-Nettles (*supra*) in the Ninth Circuit, and Nowery (*supra*) in the Third Circuit, all hold, then the shipowner would be liable as a matter of law under the Jones Act.

(2) There was at least a question of fact as to whether Kossman, as First Assistant Engineer of defendant, did not commit an act of fellow servant negligence in turning over the car to Third Assistant Engineer Wold, at the dock, having planned the hiring of the car with Wold on the ship, during a bus strike, when members of the crew were transported in the car, both prior to and at the time of the accident.

(3) Although as a general rule the shipowner would be liable only for maintenance and cure for most accidents during shore leave occurring miles from the ship since there is usually no fellow servant involved, nevertheless in those unusual cases like the case sought to be reviewed there is liability for indemnity when the accident arises in the course of employment at the hands of a fellow servant. For the purpose of liability assault cases are not *sui generis* endowed with a larger measure of jurisdiction than other cases of fellow servant negligence.

Conclusion.

A. We have shown by the decisions of three Circuit Courts of Appeals and the Supreme Court the liability for the negligence of Wold as a matter of law.

1. Taking a shipmate (drunk or otherwise) back to his ship is within the scope of employment and within the Jones Act. It is "an act of a servant which is in furtherance of the master's interest, is an act in the course of and within the scope of his employment." (*McDonough* vs. *Buckeye SS. Co.*)

2. "And if for the purpose of determining the shipowner's liability for maintenance and cure, the seaman is said to be on the shipowner's business while on shore leave I can see no valid reason why for the purpose of determining the shipowner's liability under the Jones Act, the seaman should not be said to be 'in the course of his employment at the same time.' " (*Nowery* v. *Smith.*)

There would be liability for the clear negligence of Wold as a matter of law.

3. Where men are stationed within limited confines for long periods of time, are allowed leave, and while returning to the place of work in an automobile where injuries result from the negligence of a co-employee, said injuries arise out of and in the course of employment even though the automobile is miles from the place of work as long as it is on the road returning the men to their place of work. (*Hostolf-Nettles Inc. and United Pacific Ins. Co.* v. *Pillsbury*)

4. Wold testified that he got on the right road back to the ship but in a strange place both directions back to the

ship looked the same to him. When he did not see houses which should have appeared, he realized he had taken the wrong direction. Because of this, he had to speed up the car to get back to the ship in time. The accident arose on shipowner's business and because of obtaining relaxation in strange surroundings.

These facts are squarely within the reasoning of the Supreme Court in Aguilar.

> "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman incurs injury, it is because of the voyage, the shipowner's business.... Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment."

More recently the Court has reiterated the above in *Warren* v. *U. S.*

It must be borne in mind that:

1. The accident arose while the men were returning to the vessel.

2. The accident arose because the men had taken the wrong road and when they were on the right road were hurrying to the vessel to leave in accordance with orders posted on the ship.

3. The accident arose while the men were under articles which they had signed only the previous day in the same port.

4. The accident arose during a bus strike of such magnitude that there were public appeals over the radio and in the press for car drivers to assist co-employees in going and coming from work.

5. The accident arose because Kossman, a high officer on the ship of defendant, a corporate object

that must act through officers, gave Wold the car at the ship knowing as anybody must that the bus strike had caused a tight transportation situation, and that as Reese testified it was customary to transport members of the crew to and from the ship in any available car. (Strikes without publicity and inconveniences are unheard of.) Wold and Kossman were officers engaged in the transportation business. Mobile was was the port of discharge of passengers.

There was no testimony that Wold had ever hired a U-Drive-It in Mobile, before this strike. Kossman had hired such a car only once before, and had been cleared.

The strike had been on from June 15, 1950 through August 22, 1950. The accident occurred July 21st, 1950. Mobile was the port of call on the run of the *Pegasus,* where articles were signed, passengers discharged and defendant maintained an important office and docks. Many of the crew members came from Mobile.

6. Kossman and Wold had agreed to hire the car on ship on the day of arrival.

B. If the Court is unwilling to go as far as the cases set forth above as a matter of law, then the case should have gone to the jury on the testimony of Wold.

The question of fact for the jury is whether at the ship was Kossman, an officer of the defendant, negligent in turning the car over to Wold knowing either:

a. That Wold was a drinking man at 21 since the day before at least he and Wold had been drinking together, and might be drunk when transporting a crew member. (The fact is that State Patrolman Corporal Phillips found Wold to be drunk at the time of the accident.)

b. That Wold was being entrusted with a car capable of great speed and that he might drive other

crew members back to the ship since there was a bus strike in Mobile which had resulted in public appeals for people with cars to join in and transport their neighbors.

c. That Kossman had only seen Wold drive at most but very little.

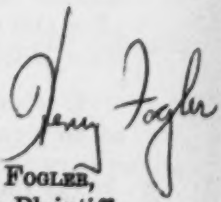
d. Only members of the crew were transported to and from the ship before and at the time of the accident.

Under the undisputed facts of the wanton and reckless speed at which the car was driven and since this is a death action, it was incumbent upon Kossman to give an explanation which would have to be submitted to the jury.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated March 31, 1956.

Respectfully submitted,



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Appendix A.

Opinion Below.

PER CURIAM:

Plaintiff's decedent, Philip G. Thurnau, a third mate of the SS. *Alcoa Pegasus*, died as the result of injuries sustained while riding as a passenger in an automobile driven by a fellow crewman, Wold. Thurnau and his companion were returning from shore leave to their duties aboard ship at the time of the accident. There was sufficient evidence from which a jury could find that Thurnau's death was caused by the negligence of Wold in the operation of the car. The car had been rented and lent to Wold by a third member of the ship's crew, Kossman.

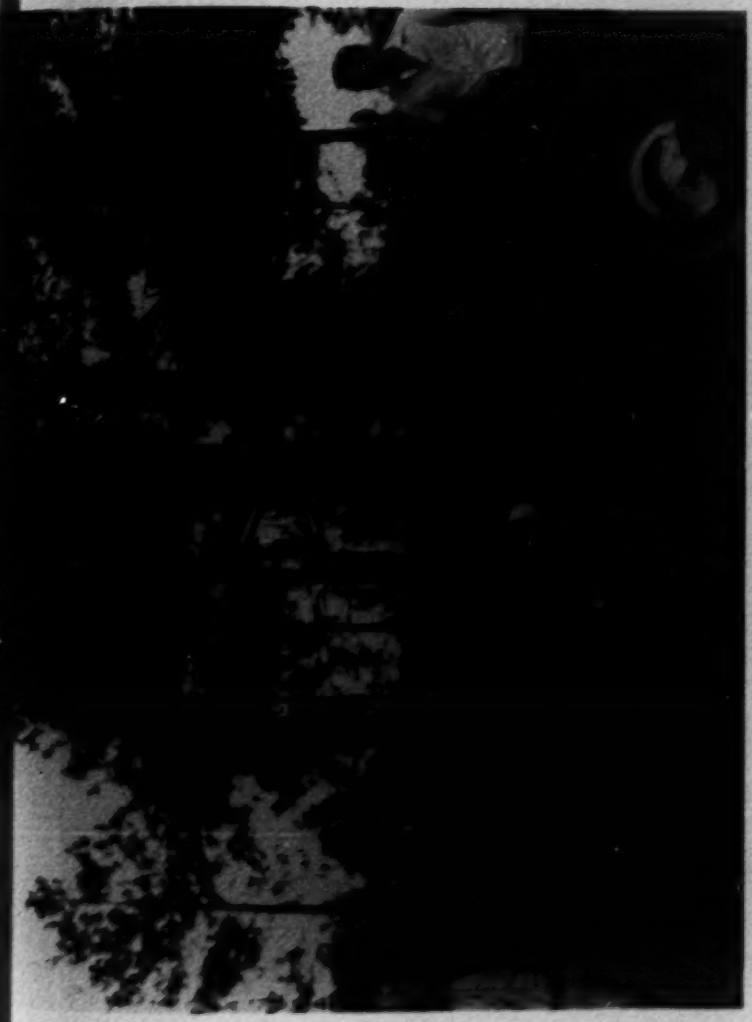
The sole question on this appeal—even if we assume, *arguendo*, that Thurnau was acting "in the course of employment" within the meaning of the Jones Act while returning to his ship from shore leave—is whether a shipowner is under a duty to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave in the vessel's home port. We think it clear that the shipowner is under no such duty, and is therefore not liable under the Jones Act for the negligence, if any, of Wold and Kossman in renting and operating a car for their private pleasure while on shore leave. See *Paul* v. *United States*, 3 Cir., 1953, 205 F. 2d 38; *Lemon* v. *United States*, D. C. Md., 1946, 68 F. Supp. 793.

The absence, because of a bus strike, of bus transportation from the dock to the places of amusement frequented by these sailors does not make the shipowner responsible for the safety of the other readily available means of transportation, such as taxis or rented cars, that may happen to be chosen by the crew. The cases relied on by the plaintiff are all distinguishable. Some are maintenance and cure cases, *Warren* v. *United States*, 340 U. S. 523 (1951); *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724 (1943). Some are assault cases, which appear to be *sui generis*, *Nowery* v.

Smith, 69 F. Supp. 755, aff'd 3 Cir., 1947, 161 F. 2d 732; *Kyriakos* v. *Goulandris*, 2 Cir., 1945, 151 F. 2d 132. And the remainder are cases involving negligence of the shipowner in creating or maintaining dangerous conditions adjacent to the ship, *Marceau* v. *Great Lakes Transit Corporation*, 2 Cir., 1945, 146 F. 2d 416; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943).

Affirmed.

Appendix B.



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